

BEFORE THE  
PHYSICAL THERAPY BOARD  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

TAMMY E. MCCELLON  
8 Schlenker  
Lodi, California 95240

Case No. 1D-2002-62974

OAH No. N2004070507

Physical Therapy Assistant License No. AT-  
4924,

Respondent.

**PROPOSED DECISION**

Administrative Law Judge Karl S. Engeman, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California on November 8, 2004.

Robert C. Miller, Deputy Attorney General, Health Quality Enforcement Unit, California Department of Justice, represented the complainant.

Tammy E. McCellon appeared and was represented by Charles A. Pacheco, Attorney at Law.

Evidence was received and the matter was submitted on November 8, 2004.

**FACTUAL FINDINGS**

1. Steven K. Hartzell, Executive Officer, Physical Therapy Board (Board), brought the Accusation solely in his official capacity. The Accusation was amended at the administrative hearing, on complainant's motion, to confirm to proof by adding an allegation consistent with Factual Finding 5 below.

2. On or about December 4, 1997, the Board issued Physical Therapy Assistant License Number AT-4924 to Tammy E. McCellon (respondent). The license was in full

force and effect at all times mentioned herein and will expire on September 30, 2005, unless renewed.

3. On or about August 6, 1996, in the Lodi Municipal Court, County of San Joaquin respondent was convicted, upon her plea of nolo contendere, of violating Vehicle Code sections 23152, subdivision (b), driving with a blood alcohol level exceeding .08 percent, and 2002, subdivision (a), leaving the scene of an accident, both misdemeanors. Imposition of sentence was suspended and respondent was placed on formal probation for the first offense for five years and she was placed on conditional probation for three years for the second offense. The terms of probation included payment of fines and restitution totaling \$2,120, two days in jail with credit for two days served, and completion of a first offender drinking driver program. The facts and circumstances were that respondent collided with a neighbor's parked car while driving in her own neighborhood. She abandoned the vehicle and ran to her nearby residence. When police went to her home, they noticed that she was intoxicated and she was arrested. Respondent's blood alcohol reading approximately one hour after the accident was .17 percent.

4. On October 18, 2001, in the Lodi Municipal Court, County of San Joaquin, respondent was convicted, upon her plea of guilty, of violating Penal Code section 484, petty theft, a misdemeanor. Imposition of sentence was suspended and respondent was placed on conditional (informal) probation for three years. The terms included payment of fines and restitution totaling \$120 and one day in jail with credit for one day served. The circumstances of the offense were that respondent stole a bottle of vodka from a grocery store by hiding it in her purse when she checked out and paid for approximately \$50 of groceries.

5. On July 18, 2002, in the Superior Court, County of San Joaquin, respondent was convicted, upon her plea, of violating Vehicle Code section 23152, subdivision (b), driving with a blood alcohol level exceeding .08 percent, a misdemeanor. Imposition of sentence was suspended and respondent was placed on probation for five years. The terms included completion of an 18 months second offender drinking driving program and payment of fines and restitution. This conviction was voluntarily revealed by respondent and she did not describe the circumstances relating to her arrest.

6. Respondent is now 41 years old. She obtained her training as a physical therapist from Sacramento City College between 1995 and 1997. She has been employed as a physical therapy assistant since her licensure in 1997. Respondent was an alcoholic for approximately seven years until May 29, 2003. She had been in an abusive marriage for approximately 15 years and she and her ex-husband both drank to excess. Respondent conceded that her heavy drinking interfered with her profession by causing her to miss work frequently. She acknowledged that her drinking posed a potential danger to patients with whom she worked. Respondent is now remarried and she and her husband resolved early in their relationship to quit consuming alcohol. Respondent was aided by the second court-ordered drinking driving program which requires her to attend two hour bi-weekly group sessions and face-to-face counseling sessions every other week. Respondent and her husband have also embraced religion which provides respondent additional strength. Respondent must attend two more drinking driver program sessions. She asserts that she has enjoyed a rebirth

and has no present desire to drink. She and her husband no longer socialize with people who abuse alcohol. Respondent is pregnant with her first child. She also helps care for her husband's two young children for whom her husband has half-time custody. She serves as a Brownie leader, attends school functions, and participates in parent-teacher conferences.

7. The actual costs of prosecution of this matter were \$1390. The reasonableness of the costs sought is discussed in the Legal Conclusions.

## LEGAL CONCLUSIONS

1. Business and Professions Code section 2239, subdivisions (a) and (b), read:

(a) The use or prescribing for or administering to himself or herself, of any controlled substance; or the use of any of the dangerous drugs specified in Section 4022, or of alcoholic beverages, to the extent, or in such a manner as to be dangerous or injurious to the licensee, or to any other person or to the public, or to the extent that such use impairs the ability of the licensee to practice medicine safely or more than one misdemeanor or any felony involving the use, consumption, or self-administration of any of the substances referred to in this section, or any combination thereof, constitutes unprofessional conduct. The record of the conviction is conclusive evidence of such unprofessional conduct.

(b) A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this section. The Division of Medical Quality may order discipline of the licensee in accordance with Section 2227 or the Division of Licensing may order the denial of the license when the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending imposition of sentence, irrespective of a subsequent order under the provisions of [Section 1203.4 of the Penal Code](#) allowing such person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, complaint, information, or indictment. (a) For any licensee holding a license issued by a board under the jurisdiction of the department, a disciplinary action taken by another state, by any agency of the federal government, or by another country for any act substantially related to the practice regulated by the California license, may be a ground for disciplinary action by the respective state licensing board. A

certified copy of the record of the disciplinary action taken against the licensee by another state, an agency of the federal government, or another country shall be conclusive evidence of the events related therein.

2. Business and Professions Code section 2660, subdivisions (d) and (l), read:

The board may, after the conduct of appropriate proceedings under the Administrative Procedure Act, suspend for not more than 12 months, or revoke, or impose probationary conditions upon any license, certificate, or approval issued under this chapter for unprofessional conduct that includes, but is not limited to, one or any combination of the following causes:

(d) Conviction of a crime which substantially relates to the qualifications, functions, or duties of a physical therapist or physical therapy assistant. The record of conviction or a certified copy thereof shall be conclusive evidence of that conviction.

(l) The commission of any fraudulent, dishonest, or corrupt act which is substantially related to the qualifications, functions, or duties of a physical therapist or physical therapy assistant. The revocation, suspension, or other discipline, restriction, or limitation imposed by another state upon a license or certificate to practice medicine issued by that state, or the revocation, suspension, or restriction of the authority to practice medicine by any agency of the federal government, that would have been grounds for discipline in California of a licensee under this chapter, shall constitute grounds for disciplinary action for unprofessional conduct against the licensee in this state.

3. Business and Professions Code section 2661.5 reads, in pertinent part:

(a) In any order issued in resolution of a disciplinary proceeding before the board, the board may request the administrative law judge to direct any licensee found guilty of unprofessional conduct to pay to the board a sum not to exceed the actual and reasonable costs of the investigation and prosecution of the case.

(b) The costs to be assessed shall be fixed by the administrative law judge and shall not in any event be increased by the board. When the board does not adopt a proposed decision and remands the case to an administrative law judge, the administrative law judge shall not increase the amount of the assessed costs specified in the proposed decision.

(c) When the payment directed in an order for payment of costs is not made by the licensee, the board may enforce the order of payment by bringing an action in any appropriate court. This right of enforcement shall be in addition to any other rights the board may have as to any licensee directed to pay costs. The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this division, under any initiative act referred to in this division and under Chapter 17 (commencing with Section 9000) of Division 3.

This section shall not apply to sexual contact between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship when that physician and surgeon provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or person in an equivalent domestic relationship.

4. Respondent is subject to discipline pursuant to Business and Professions Code sections 2239, subdivisions (a) and (b), and 2660, subdivision (d), by reason of Factual Findings 3 and 5.

5. Respondent is subject to discipline pursuant to Business and Professions Code section 2260, subdivision (d) and (l), by reason of Factual Finding 4.

6. *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 sets forth the factors to be considered in determining the reasonableness of costs. The factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay and whether the scope of the investigation was appropriate to the alleged misconduct. Respondent did not attempt to challenge any of the allegations. Both parties agreed that this matter warrants the issuance of a probationary license. There was no evidence presented regarding respondent's ability to pay the costs sought. The costs appear reasonably related to the complexity of the case. The \$1,390 amount sought is reasonable.

ORDER

Physical therapy assistant license number AT- 4924 issued to respondent Tammy E. McCellon is revoked. However, the revocation is stayed and respondent is placed on probation for five (5) years on the following terms and conditions:

1. *Cost Recovery*

Respondent shall reimburse the Board its costs incurred in this case in the amount of \$1390. The payments shall be made in accordance with a schedule established by the Board or its delegates.

2. *Prohibition of the Use of Alcohol*

Respondent shall abstain completely from the use of alcoholic beverages.

3. *Biological Fluid Testing*

Respondent shall immediately submit to biological fluid testing, at respondent's cost, upon the request of the Board or its designee.

4. *Diversion Program*

Within 15 days from the effective date of this decision, respondent shall enroll and participate in the Board's Diversion Program, and shall do so until the completion of this probation. Failure to comply with requirements of the Diversion Program, terminating the program without permission, or being expelled for cause, shall constitute a violation of probation by respondent.

5. *Probation Monitoring Costs*

All costs incurred by the Board for probation monitoring during the entire period of probation shall be reimbursed by respondent. Respondent will be billed at least quarterly. Failure to make the ordered reimbursement within 60 days of the billing shall constitute a violation of the probation order. In addition to the filing of an Accusation or the issuance of an administrative citation, the filing of criminal charges shall be sought when appropriate.

6. *Obey All Laws*

Respondent shall obey all federal, state and local laws, and statutes and regulations governing the practice of physical therapy in California.

7. *Quarterly Reports*

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

8. *Probation Monitoring Program Compliance*

Respondent shall comply with the Board's probation monitoring program.

9. *Interview with the Board or its Designee*

Respondent shall appear in person for interviews with the Board, or its designee, upon request at various intervals and with reasonable notice.

10. *Notification of Probation Status to Employers*

Respondent shall notify all present or future employers of the reason for and the terms and conditions of the probation by providing a copy of the Petition and this Decision and Order to the employer. The respondent shall obtain written confirmation from the employer that the documents were received. If the respondent changes, or obtains additional employment, the respondent shall provide the above notification to the employer and submit written employer confirmation to the Board within 10 days. The notification(s) shall include the name, address and phone number of the employer, and, if different, the name, address and phone number of the work location.

11. *Notification of Change of Name or Address*

Respondent shall notify the Board, in writing, of any and all changes of name or address within ten days.

12. *Restriction of Practice - Temporary Services Agencies*

Respondent may only practice or perform as a physical therapist assistant in a supervised structured environment. The respondent shall not work for a temporary services agency or registry.

13. *Prohibited Use of Aliases*

Respondent may not use aliases and shall be prohibited from using any name which is not his/her legally-recognized name or based upon a legal change of name.

14. *Work of Less Than 20 Hours per Week*

If the respondent works less than 192 hours in a period of three months, those months shall not be counted toward satisfaction of the probationary period. The respondent shall notify the Board if he works less than 192 hours in a three month period.

15. *Tolling of Probation*

The period of probation shall run only during the time respondent is practicing within the jurisdiction of California. If, during probation, respondent does not practice within the jurisdiction of California, respondent is required to immediately notify the probation monitor in writing of the date that respondent's practice is out of state, and the date of return, if any. Practice by the respondent in California prior to notification to the Board of the respondents return will not be credited toward completion of probation. Any order for payment of cost recovery shall remain in effect whether or not probation is tolled.

16. *Violation of Probation*

If respondent violates probation in any respect, the Board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

17. *Cease of Practice Due To Retirement, Health or Other Reasons*

Following the effective date of this probation, if respondent ceases practicing as a physical therapist assistant due to retirement, health or other reasons respondent may request to surrender his/her license to the Board. The Board reserves the right to evaluate the respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the tendered license, the terms and conditions of probation shall be tolled until such time as the license is no longer renewable, the respondent makes application for the renewal of the tendered license or makes application for a new license.

18. *Completion of Probation*

Upon successful completion of probation, respondent's license or approval shall be fully restored.

DATED: December 6, 2004

Original Signed By:  
KARL S. ENGEMAN  
Administrative Law Judge  
Office of Administrative Hearings



**BEFORE THE  
PHYSICAL THERAPY BOARD  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the First Amended )  
Amended Against: )  
TAMMY E. MCCCELLON )  
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Case #: 1D 2002 62974

OAH No.: N2004070507  
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The foregoing Proposed Decision, in case number 1D 2002 62974, is hereby adopted by the Physical Therapy Board, Department of Consumer Affairs, State of California.

This decision shall become effective on the 17th day of February, 2005.

It is so ordered this January 18, 2005 .

Original Signed By:  
Donald A. Chu, P.T., President  
Physical Therapy Board  
of California